Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1066

EUGENE ENSLIN,

Petitioner,

v.

DARRYL WALLFORD, Superintendent, New Hanover County Prison Unit, North Carolina Department of Correction,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No.

EUGENE ENSLIN,

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v.

DARRYL WALLFORD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Eugene Enslin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the United States District Court for the Eastern District of North Carolina dismissing petitioner's application for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported, and is set forth in the Appendix hereto, infra pp. 1a-2a. The opinion of the United States District Court for the Eastern District of North Carolina is unreported and is set forth at Appendix pp. 4a-6a.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was filed on November 1, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

A. Was the Court of Appeals' determination that this Court's summary affirmance in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901 (1976) was dispositive of the primary issue raised in this case erroneous?

B. Does North Carolina General Statute 14-177 violate the constitutional rights of liberty and privacy guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution?

C. Is North Carolina General Statute 14-177 unconstitutionally vague?

D. Does North Carolina General Statute 14-177 violate the Establishment Clause of the First Amendment?

E. Does North Carolina General Statute 14-177 violate the Equal Protection Clause of the Fourteenth Amendment?

F. Was petitioner's prosecution under North Carolina General Statute 14-177 so arbitary as to deny him due process and equal protection of the law?

STATUTE INVOLVED

North Carolina General Statute §14-177:

> "If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court.

STATEMENT OF THE CASE

Petitioner, an adult, was convicted of performing an act of oral sex, in his own home, with a consenting male adult. The indictment charged that on June 7, 1974, petitioner "unlawfully, willfully and feloniously did commit the abominable and detestable crime against nature with Herbert P. Morgan, a male person."(R. 2).* He was tried and convicted by a jury on his plea of not guilty and was sentenced to a one year term of imprisonment.

At trial, Detective Sam Hudson of the Jacksonville, North Carolina Police Department, testified on behalf of the

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* The symbol "R" refers to the transcript of the record at trial.

prosecution. On cross-examination he stated that he had known the petitioner to be a homosexual, (R. 16), and that he therefore wished "to run [petitioner] out of town" (R. 16) by contriving to have petitioner violate §14-177. He stated further that he therefore intentionally sent a seventeen year old member of the U.S. Marine Corps, Herbert P. Morgan, who was not a homosexual (R. 13), to entice petitioner into committing the act of sodomy. (R. 16). As Detective Hudson himself put it,

> This was a deliberate and planned effort on my part using this 17 year old prosecuting witness, Herbert Morgan, to set Mr. Enslin up so that I could prosecute him for homosexual conduct. (R. 17).*

Hudson further stated that he had been employed by the police department for eight years and that he had no knowledge of any other arrests for the crime against nature during those years. (R. 13, 16, 17).

Herbert Morgan confirmed that Detective Hudson had asked him to approach petitioner and present him with the opportunity to commit the crime against nature with him. He testified that Detective Hudson had asked him if he would be willing to go to the Tri-Massage Parlor, a massage parlor managed by petitioner, and give petitioner

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* The age of consent in the State of North Carolina is seventeen.

an opportunity to commit the crime against nature with him. He agreed to do so. He was given marked money to pay petitioner for his services should a request for payment be made. (R. 11, 13). On June 7, 1974, Morgan therefore went to the bookstore next to the Tri-Massage Parlor and asked for Mr. Enslin. He testified that he had never met Enslin before that date. Upon meeting Enslin in the bookstore, Morgan told Enslin that some friends of his at the base had told him to see Enslin if he was looking for a little "extra excitement." Morgan left petitioner to advise Detective Hudson of his conversation and to receive further orders. He found the detective hiding in the bushes with binoculars for the purpose of observing Morgan's and Enslin's activities.

Morgan further stated that Detective Hudson directly advised him to participate in the sex act with petitioner. (R. 11). Morgan and petitioner then went to petitioner's living quarters, which was a room behind the bookstore. Once in the room, petitioner committed the act of fellatio upon Morgan. (R. 8).

On cross-examination, Morgan stated that he was an adult at the time of the act, that he consented to the sexual act, that petitioner did not use any force, nor did money change hands. (R. 11). He further stated that it was impossible for anyone to see into the room because the room had no windows and was strictly private. (R. 11, 12). In fact, Detective Hudson testified that when he hid in the bushes across from the bookstore with a

pair of binoculars to observe the activity of the two men, he could see the men only while they were in the bookstore with the use of the binoculars, but could not see them once they entered petitioner's room where the act was committed. (R. 13, 15).

Prior to his plea of not guilty petitioner made a motion to quash the indictment based on the unconstitutionality of G.S. 14-177. A separate hearing was had on the merits of the motion to quash.

Albert D. Klassen, Jr. testified as an expert witness on behalf of petitioner, for the purpose of showing that the proscriptions of G.S. 14-177 negatively and seriously affect millions of people and that the law does not serve any legitimate purpose. Mr. Klassen is a sociological researcher on the staff of the Kinsey Institute for Sex Research in Bloomington, Indiana. He is an expert on human sexuality and has conducted his own national surveys on sex research. The Kinsey Institute has the largest archives in the world on human sexuality. Klassen testified that as part of his occupation he has familiarized himself with all the information available at the Institute on the effects and causes of homosexuality. (R. 26, 27). The court accepted Mr. Klassen as qualified to testify as a sociological researcher with a specialty in human sexuality.

Klassen testified that the act of fellatio committed by petitioner and proscribed by G.S. 14-177 is performed by a very large percentage of this country's

heterosexual and homosexual population (50% - 60% of heterosexuals practice oral sex; 20% - 30% of heterosexuals practice anal intercourse; and 35% to 40% of all American males have practiced oral sex with another male). He stated that the laws prohibiting these acts are honored more in their breach and that there are few prosecutions for the acts. (R. 28-33). He also testified that according to Kinsey and other statistics there are two to five million homosexuals in this country (R. 28) and that there is nothing unclean, unhealthy or unnatural about the prohibited sex acts. He testified that in fact sex counsellors advise people to perform these acts. (R. 29).

Mr. Klassen stated that, contrary to myth, surveys show that homosexuals are not child molesters and their sex drive is no more uncontrollable than that of heterosexuals (R. 30). He also stated that there is no evidence that children or adults can be converted to homosexuality by exposure to homosexuals and that removal of criminal sanctions will not cause an increase in the numbers of homosexuals (R. 31). He found in his interviews with homosexuals that the criminal laws did not play a preventive role in stopping their activities but only led to the acts occurring in more lonely and repressive situations. (R. 31).

According to the American Psychiatric Association homosexuals are not pathological and should not be subject to rehabilitation (R. 31). In any case, he testified that changing sexual orientation is painful, costly and almost impossible to accomplish (R. 32). Mr. Klassen

also found it to be folly to try to "rehabilitate" a homosexual by sending him or her to prisons which are limited in their populations to members of the same sex. (R. 32, 33).

Mr. Klassen testified that the National Institute of Mental Health found that there is no nexus between homosexuality and the ability to perform a job, but that homosexuals are subject to substantial employment discrimination and societal prejudice, (R. 34).

Mr. Klassen stated that, according to psychiatrists, greater social acceptance is imperative for the increased mental health of homosexuals; and in fact, he cited studies which show that suppression of sexuality in any human being, homosexual or heterosexual, is negatively correlated with mental health (R. 35).

He testified that greater acceptance of homosexuality will not undermine the institution of marriage. He found, instead, that suppression of homosexuality leads to marriage breakdowns because homosexuals are pressured into entering into marriages with heterosexuals. The marriages usually end in divorce because of sex problems. (R. 35).

The state offered no evidence to support the justification for G.S. 14-177.

At the close of the hearing petitioner moved to quash the indictment and dismiss the prosecution. Petitioner had also moved for a declaration of non-suit at the close of the state's evidence

and at the close of the hearing on the motion to quash. All the motions were denied. Petitioner appealed to the North Carolina Court of Appeals. The Court of Appeals affirmed the judgment of the Superior Court stating only that no error was found and that G.S. 14-177 was constitutional. People v. Enslin, 25 N.C. App. 662 (1975).

Petitioner filed a notice of appeal and a petition for writ of certiorari from the lower courts' decisions with the Supreme Court of North Carolina. Thereafter, the appeal was dismissed and the writ was denied without opinion. Enslin v. North Carolina, 288 N.C. 245 (1975). Petition for certiorari to the Supreme Court of North Carolina was denied by this Court, Enslin v. North Carolina, 425 U.S. 903, reh. denied 425 U.S. 985 (1976).

Petitioner then filed this habeas corpus proceeding in the United States District Court for the Eastern District of North Carolina, contending that his conviction was unconstitutional. Respondent moved to dismiss the petition, with no supporting memorandum, and petitioner filed a memorandum in opposition thereto. On January 3, 1977, the District Court entered an order dismissing the petition (Appendix p. 3a) without a hearing and without affording the petitioner an opportunity to submit expert or other testimony.

Petitioner appealed the dismissal to the United States Court of Appeals for the Fourth Circuit. On November 1, 1977, the Court of Appeals affirmed the dismissal, in a two-page decision (Appendix p. 1a), review of which is here sought.

REASONS FOR GRANTING THE WRIT

A. THE COURT BELOW ERRED IN FINDING, CONTRARY TO THE EXPRESS STATEMENT OF THIS COURT, THAT DOE V. COMMONWEALTH'S ATTORNEY WAS DISPOSITIVE OF THE PRIMARY ISSUE RAISED IN THIS CASE

This case involves the question whether the government may constitutionally prohibit private consensual homosexual activity between adults.

In dismissing the petiton for habeas corpus, the District Court below relied on Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), sum. aff'd., 425 U.S. 901 (1976), where a three-judge court had held that Virginia's sodomy statute could consitutionally be applied to private homosexual activity between consenting adult males.

In affirming the dismissal, the Court of Appeals below held:

> The constitutional question presented to the Court in that case [Doe, supra] was the same as that principally asserted by Enslin, and we agree with the district judge that the summary affirmance in Doe is appropriately dispositive of the primary issue raised in this case. (Appendix p. 1a).

Thus the Court of Appeals assumed, as have some other lower courts subsequent to this Court's summary affirmance, without opinion, of Doe v. Commonwealth's Attorney, supra, that the Court's decision there established that the constitution did not protect the right to private, adult consensual sexual conduct, whether homosexual, e.g., Matlovich v. Secretary of the Air Force, 2 Sex.L.Rptr. 53 (D.D.C. No. 75-1750, Jul. 16, 1976); Berg v. Claytor, No. 76-0944 (D.D.C., decided May 27, 1977) or heterosexual, Louvisi v. Slayton, 539 F. 2d 349 (4th Cir. 1976), cert. denied 45 U.S.L.W. 3399 (1976).

Other lower courts, however, have not construed Doe to have such implications. People v. Rice, People v. Mehr, 41 N.Y. 2d 1018 (1977), Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977).

This Court itself appeared to have answered the question of the scope of Doe v. Commonwealth's Attorney in its recent decision in Carey v. Population Services International, ____ U.S. ____, 52 L. Ed. 2d 675 (1977). There, in striking down New York State's restrictions on the right of minors to access to contraceptives, the Court noted:

> "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," infra, n. 17, and we do not purport to

answer that question now."
Id. at ____, 52 L. Ed. 2d
at 687, n. 5.

Thus the majority of the Court concurred that Doe v. Commonwealth's Attorney had not determined the extent to which the constitution prohibited state statutes regulating private consensual sexual behavior among adults, and indicated further that it was not doing so in Carey. The effect of this statement was underscored by Justice Rehquist's dissent, _____ U.S. _____, 52 L. Ed. 2d at 705, n. 2.

Accordingly, it would seem clear from the Court's explicit instruction in Carey v. Population Services International as to the extent of its prior holding in Doe v. Commonwealth's Attorney that the Court of Appeals below should not have found the primary question involved in this case - the precise question of the extent to which the constitution prohibits statutes such as North Carolina General Statute 14-177, which criminalizes private consensual sexual behavior among adults - precluded and determined by Doe, supra.

Nonetheless, the decision of the Court of Appeals below which fails to take note of Carey, supra, as well as the previously cited decisions subsequent to Doe by both federal and state courts indicates that there is great uncertainty and conflict of opinion among the lower courts concerning the proper resolution of this difficult and fundamental question of law.

Not only is this uncertainty in the law undesirable from the point of the judicial resolution of conflicts involving the issue, but, even more compellingly, it causes great anxiety and uncertainty among millions of homosexuals, whose rights of liberty and privacy in the most intimate aspect of their lives are cast in doubt.

The Court, therefore, should accept this case for review as it presents the issue in the context of an individual actually deprived of liberty and imprisoned solely for private consensual adult sexual behavior.

B. THE SUBSTANTIAL CONSTITUTIONAL QUESTIONS PRESENTED HERE HAVE NOT YET BEEN DETERMINED

The Court of Appeals dismisses in one paragraph petitioners constitutional challenges to North Carolina G.S. 14-177 on the grounds of vagueness, equal protection, and establishment of religion. From this Court's statement in Carey, however, it is clear that the Court does not consider that it has addressed the various constitutional infirmities that such statutes may be subject to, in addition to the issues of liberty and privacy.

With respect to the issues of liberty and privacy, even prior to Carey v. Population Services International, supra, petitioner would have urged that Doe v. Commonwealth's Attorney, supra, was not determinative on those issues. For the Court had previously stated that

> an unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation

> by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmance may appear to have established. Hicks v. Miranda, 422 U.S. 332, 391-392 (1975)

One of the doctrines previously announced in this Court's opinions is the doctrine, stated in Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), that

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

This doctrine of individual liberty or privacy to decide, antonomously and free from unwarranted governmental interference, matters fundamentally affecting one's private sexual life, has been recently reaffirmed by the Court in Carey v. Population Services International, supra, and has been applied in the context of private sexual matters also in Stanley v. Georgia, 394 U.S. 557 (1969).

Because, however, as indicated by the Court in Carey, there has been no definitive articularion by the Court of the extent to which this constitutional right of liberty and privacy extends to private consensual adult sexual acts themselves, the lower courts have differed among themselves on the issue, and persons such as petitioner here have suffered and been incarcerated for violations of statutes criminalizing such conduct.

The Court should now give plenary consideration to this most fundamental issue of private sexual conduct.

The Court of Appeals brushed aside petitioner's contentions below that the North Carolina "crime against nature" statute violated the First Amendment Establishment Clause and denied petitioner equal protection of the law and that his prosecution was arbitrary by stating that they were "without merit."

The decision of the three-judge District Court in Doe v. Commonwealth's Attorney itself belies the contention that petitioner's Establishment Clause claim is without merit, as the court there relied in part on Leviticus as the foundation for its decision.

Similarly, the Court of Appeal's dismissal of petitioner's claims that his prosecution was arbitrary and denied him equal protection of the law were without merit cited no authority of this Court for its holding, and flies in the face of the uncontroverted evidence,

summarized in the Statement of the Case, supra, of the arbitrary nature of petitioner's prosecution.

CONCLUSION

For all of the foregoing reaons, the petition should be granted and a plenary hearing and determination of the fundamental issues of the extent to which the state may constitutionally regulate private consensual sexual conduct among adults should be given by the Court.

Respectfully submitted,

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Attorney for Petitioner

January 27, 1978

UNPUBLISHED

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1309

EUGENE ENSLIN, Appellant,

versus

DARRYL WALLFORD, Superintendent, New Hanover County Prison Unit, North Carolina Department of Correction, Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Argued October 3, 1977 Decided November 1, 1977

Before BUTZNER, Circuit Judge; FIELD, Senior Circuit Judge, and THOMSEN, Senior District Judge.*

Joel M. Gora, American Civil Liberties Union (Norman B. Smith and Michael B. Curtis, Smith, Patterson, Follin, Curtis and James; E. Carrington Boggan, Lambda Legal Defense & Education Fund., Inc.; James H. Stark, Third Year Law Student on brief) for Appellant; Edward M. Speas, Jr., Special Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellees.

* Honorable Roszel C. Thomsen,
District of Maryland
Sitting by designation.

PER CURIAM:

Eugene Enslin filed a petition for habeas corpus in the district court claiming that his conviction under the North Carolina "crime against nature" statute, N.C.G.S. 14-177, violated his constitutional rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments.[1] The petition was dismissed and Enslin has appealed.

In dismissing the petition, the district judge relied upon Doe v. Commonwealth, 403 F.Supp. 1199 (E.D. Va. 1975), where a three-judge court had held that Virginia's sodomy statute could constitutionally be applied to private homosexual activity between consenting adult males. Upon appeal Doe was summarily affirmed by the Supreme Court of the United States, 425 U.S. 901 (1976). The constitutional question presented to the Court in that case[2] was the same as that principally asserted by Enslin, and we agree with the district judge that the summary affirmance in Doe is appropriately dispositive of the primary issue raised in this case.

In regard to the other issues raised by the petitioner, the vagueness challenge is foreclosed by Wainwright v. Stone, 414 U.S. 21 (1973), and Rose v. Locke, 423 U.S. 48 (1975), and Enslin's contentions that the statute violates the Establishment Clause of the First Amendment, and that his prosecution was arbitrary and denied him the equal protection of the law are without merit. See Rhinehart v. Rhay, 404 F.2d 718 (9 Cir. 1971), and Moss v. Hornig, 314 F.2d 89 (2 Cir. 1963).

The order of the district court is affirmed.

AFFIRMED.

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1. Petitioner's conviction was affirmed by the North Carolina Court of Appeals. State v. Enslin, 25 N.C.App. 662, 214 S.E.2d 318 (1975). Petition for a writ of certiorari was denied by the Supreme Court of North Carolina. State v. Enslin, 288 N.C. 245, 217 S.E.2d 669 (1975). Certiorari was denied by the Supreme Court of the United States, sub nom, Enslin v. North Carolina, 425 U.S. 903, reh.den. 425 U.S. 985 (1976).

2. See, JURISDICTIONAL STATEMENT in the Supreme Court of the United States, October Term, 1975, John Doe, et al., Appellants, v. Commonwealth's Attorney for City of Richmond, et al., Appellees, No. 75-896.

FILED

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JOHN R. WHITTY, CLERK
U. S. DISTRICT COURT
E. DIST. NO. CAR.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

EUGENE ENSLIN,)
)
Petitioner) NO. 76-0149-HC
)
VS.)
) ORDER
DARRYL WALLFORD, etc.,)
)
Respondent)

This habeas petition has a confused history. The respondent answered and moved to dismiss the petition on October 18, 1976, thereby giving petitioner twenty days under Local Rule 4 to respond to the motion to dismiss. On November 9, 1976, this court entered an order extending the time for response to December 5, 1976. No response having been filed by that date, this court entered an order on December 13, 1976, dismissing the petition. On December 14, 1976, the Clerk of this court approved a stipulation, dated December 10, 1976, and signed by counsel for both parties, extending the petitioner's time to respond until December 15, 1976. On December 17, 1976, the Clerk received a brief from petitioner's out-of-state co-counsel in response to the motion to dismiss, but it was returned without filing since it lacked the signature of a member of this court's bar as required by the local rules. In light of this sequence of events, this court hereby vacates its order of December 13, 1976, considers the brief of petitioner's counsel in response to the

motion to dismiss as timely filed, and again turns to the merits of the petition.

Petitioner claims that North Carolina's "crime against nature" statute, N.C.G.S. 14-177, when interpreted to prohibit private homosexual acts between consenting adults, violates his constitutional rights to privacy under the First, Fourth, Fifth, Ninth and Fourteenth Amendments, to be free from conviction under vague statutes and to equal protection of the law as guaranteed by the Fourteenth Amendment, and to be free from state establishment of religion as assured by the First and Fourteenth Amendments. The North Carolina Court of Appeals affirmed the conviction of petitioner, 25 N.C.App. 662 (1975), and both the North Carolina Supreme Court and the United States Supreme Court denied certiorari. 288 N.C. 245 (1975), 49 L.Ed.2d 753 (1976).

In Doe v. Commonwealth Attorney for City of Richmond, 403 F.Supp. 1199 (E.D.Va. 1975), a three-judge court held that Virginia's sodomy statute could constitutionally be applied to homosexual relations between adult males, done consensually and privately, despite plaintiff's assertion of the same constitutional rights as petitioner asserts here.

The appeal to the Supreme Court in Doe presented the constitutional issues squarely; the petition read:

> "Does Virginia Code 18.1-212, as applied to sexual activity between consenting adults in private, violate defendant's constitutional rights to privacy, due process, and equal protection under First, Fourth, Fifth, Ninth and Fourteenth Amendments?"
> 44 L.W. 3448 (February 10, 1976).

In a one-sentence order, the Supreme Court summarily affirmed. 96 S.Ct. 1489 (1976).

Petitioner distinguishes Doe on the grounds that the record before the three-judge court and the Supreme Court was incomplete in that it contained no expert testimony in the fields of psychiatry, psychology, sociology and theology to demonstrate the extent to which the statute infringed the plaintiff's claimd right to privacy. Although this court has no way of ascertaining the record compiled in Doe, it notes that this petitioner was given full opportunity to present expert testimony at his trial, and the testimony produced there was part of the record on which the Supreme Court based its denial of certiorari. Furthermore, whatever additional evidence could be produced at another hearing, it would not allow this court to disregard the recent decision of the Supreme Court that the consensual, private, homosexual acts of adult males are not protected from criminal prosecution by any right to privacy guaranteed by the Bill of Rights. In language cited approvingly in Hicks v. Miranda, 422 U.S. 332, 344 (1975), the Supreme Court noted that "the lower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not." Giving appropriate precedntial value to the summary affirmance in Doe, this court concludes that it is dispositive in this case.

The defendant's motion to dismiss the petition is allowed and the action is dismissed.

F. T. DUPREE, JR., UNITED STATES DISTRICT JUDGE

January 3, 1977.